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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 211

METROMEDIA, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent,

—and—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 3, 1965

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IN THE

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No.

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Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a final order and judgment of the United States District Court for the Southern District of New York denying a motion of petitioner to punish respondent ("ASCAP") for civil contempt for violating an antitrust decree, or alternatively, to require the United States, as plaintiff, so to move.

Opinions Below

The District Court for the Southern District of New York did not render an opinion. Its judgment dated and filed on March 25, 1964, was endorsed on the back of petitioner's motion papers:

> "Motion denied. See record and transcript of proceedings; so ordered."

The opinion of the Court of Appeals for the Second Circuit, printed in Appendix A hereto, is reported in 341 F.2d 1003 (1965).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and is supported by *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U. S. 39 (1963).

Uncertain whether the controversy is inside or outside "the mainstream of the litigation in which the Government is directly concerned" (*Shenandoah, supra*), petitioner also filed a Notice of Appeal to this Court from the order and judgment of the District Court and a Jurisdictional Statement is being filed with this Court concurrently with this Petition for Certiorari. Expediting Act, § 2, 15 U. S. C. § 29; *Terminal R.R. Ass'n* v. *United States*, 266 U. S. 17 (1924).

Petitioner is thus proceeding concurrently by appeal and petition for certiorari, rather than risk dismissal because of an erroneous choice of appellate route.

Questions Presented

I. May a beneficiary of a government antitrust decree, who is injured by the defendant's noncompliance with that decree, enforce obedience to the decree if the government refuses to do so?

II. May a government antitrust decree authorize the defendant's continuing violation of the antitrust laws?

Statutes Involved

The statutory provisions involved are Rule 71 of the Federal Rules of Civil Procedure and §1 of the Sherman Act, 15 U. S. C. §1. They are printed in Appendix B hereto.

Statement

Petitioner owns and operates radio stations which use copyrighted music in their programming.

ASCAP is a performing rights society to which various copyright proprietors have granted the right to license the public performance for profit of copyrighted music owned by them. The opinion below described ASCAP as a "vast business enterprise controlling the licensing and distribution of a very large majority of the nation's copyrighted musical wares."

The government's complaint in this action against ASCAP, filed on February 26, 1941, alleged that in

violation of the Sherman Act and as part of a conspiracy, ASCAP "refuse(d) to alter or change the terms of the contracts executed by and between the Society and radio broadcasting stations"[1] and that it refused to renew licenses to radio broadcasters "unless the radio broadcasters accepted the licenses tendered to them by Society."[2] A consent decree against ASCAP was entered in this action on March 4, 1941, and was amended on March 14, 1950 (the "Amended Judgment").[3]

Section VI of the Amended Judgment orders ASCAP "to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory." Section IX(A) further orders ASCAP "upon receipt of a written application for a license for the right of public performance" of ASCAP's repertory to "advise the applicant in writing of the fee which it deems reasonable *for the license requested.*"[4]

On December 23, 1963, petitioner, a user of ASCAP music, made written application to ASCAP on behalf of its radio stations for a "blanket" license (i.e., for the right of public performance of all of the compositions in the ASCAP repertory) and requested ASCAP to advise petitioner in writing of the fee which it deemed reasonable for the blanket license requested.

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[1] Civil Action 13-95, Complaint Par. 15E.

[2] *Id.*, Par. 15F.

[3] R. Vol. I, pp. 2a-19a, inclusive. Page references with the prefix "R" are to the Appendix filed with the Court of Appeals and transmitted to this Court in compliance with Rule 21(3) of its Rules.

[4] Emphasis supplied.

ASCAP refused to quote a fee for the license requested and has insisted that the Amended Judgment permits it and its 9,000 members acting in concert to refuse to deal with petitioner on any form of license other than one dictated by ASCAP. (R. Vol. I, pp. 30a-33a, 86a-87a)

The form and terms of the blanket license requested (R. Vol. I, p. 66a) differed somewhat from ASCAP's latest form of blanket license (R. Vol. I, p. 36a) which had previously been issued to petitioner. Petitioner requested a different form of blanket license because ASCAP's latest form had proven to be discriminatory, arbitrary, inflationary and burdensome, as to petitioner. Section IV(C) of the Amended Judgment bars discrimination by ASCAP in "license fees or other terms and conditions between licensees similarly situated." Section VIII orders "ASCAP, in fixing its fees . . . to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses."

On March 5, 1964, more than 60 days[5] after its application to ASCAP for a reasonable fee, petitioner

[5] The opinion below incorrectly indicates, in footnote 3, that petitioner did not make a good faith attempt to negotiate and did not wait 60 days from the date of its application to ASCAP before approaching the government or moving to enforce the decree. The application to ASCAP for a license was made on December 23, 1963 (R. Vol. I, p. 30a). Petitioner, in December, January and February, specifically requested that ASCAP quote a fee (R. Vol. I, p. 25a); petitioner offered to negotiate with ASCAP and announced its readiness to consider concessions to ASCAP (R. p. 31a). It is uncontroverted that it was ASCAP which expressly refused to negotiate with petitioner (R. Vol. I, pp. 25a, 30a-32a). Notwithstanding ASCAP's refusal, petitioner waited more than 60 days before approaching the government on March 5, or moving on March 13, to enforce the decree (R. Vol. I, pp. 84a, 20-22a).

requested that the Department of Justice, on behalf of the Government, initiate civil contempt proceedings against ASCAP for "adamantly refusing to deviate from the form of license latterly issued by it" and "limiting broadcasters to the forms of licenses ASCAP deems most conducive in furthering its own economic interests." (R. Vol. I, pp. 84a-88a). On March 10, 1964, the government replied that it did not propose to make any decision on the request until the United States Court of Appeals for the Second Circuit had rendered its opinion in *Shenandoah* (R. Vol. I, p. 89a).

On March 13, 1964 petitioner moved in the District Court for the Southern District of New York to punish ASCAP for contempt for its neglect and refusal to comply with and obey the Amended Judgment, or in the alternative, to direct the United States, as plaintiff in the action, to so move that court (R. Vol I, p. 20a). Petitioner's affidavits alleged, with supporting statements of fact, ASCAP's violation of the Amended Judgment. (R. Vol. I, pp. 24a-90a).

ASCAP did not submit any affidavits in opposition to those submitted on behalf of petitioner.

The District Court denied petitioner's motion without opinion.

Because of the uncertainty of the applicable appellate procedure, petitioner filed two notices of appeal from the District Court judgment: one to this Court pursuant to the Expediting Act; the other, to the Court of Appeals for the Second Circuit. The District Court approved an application of the parties

to extend petitioner's time to perfect its direct appeal to this Court until after the Court of Appeals ruled on the appeal to it.

The Court of Appeals affirmed the judgment of the District Court. The court ruled that the appeal was properly before it, that petitioner, even if "affected" and "benefited" by the Amended Judgment, had no standing to seek compliance with the Amended Judgment, and that even if standing existed, the undisputed facts did not establish a violation of the terms of the Amended Judgment.[6]

The government has disclaimed a position on the merits but argued below that petitioner had no standing.

Reasons for Granting the Writ

I

The denial of enforcement rights to private parties who are beneficiaries of civil antitrust decrees entered in Government actions is the principal question raised by this case. That this question was answered errone-

[6] The Court of Appeals misunderstood the Amended Judgment. This is evidenced by the statement in its opinion, footnote 2, that "The total net effect of the changes does not appear in the record." The effect of petitioner's proposed license could not possibly appear in the record and could not be computed because ASCAP violated the Amended Judgment at the threshold by refusing to quote a fee for the license requested. This is what necessitated petitioner's motion.

The same misconception underlies the view of the court below that petitioner "failed to follow the route marked out by the decree" because petitioner has not yet instituted a rate proceeding. The Amended Judgment does not contemplate a proceeding to determine the reasonableness of a rate until ASCAP has quoted a fee.

ously below is clear from this Court's recent opinion in *Minnesota Mining and Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 33 U. S. L. Week 4481, 4484 (May 24, 1965). Referring to the "clearly-expressed desire [of Congress] that private parties be permitted the benefits of prior government actions," this Court said:

> "Otherwise the benefits flowing from a major segment of the Government's enforcement effort would, in many cases, be denied to private parties."

This case also raises the question of the proper interpretation of Rule 71 of the Federal Rules of Civil Procedure, which has never been the subject of an opinion by this Court. This Court has in the past recognized the importance of settling questions of construction of the Federal Rules. E.g., *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

Rule 71 confers standing upon non-parties to enforce orders made in their favor. The Court of Appeals appears to have assumed that petitioner was "economically benefited by the decree" and "affected by the judgment" but nevertheless held that the Amended Judgment was not made "in favor of" petitioner.

However, in considering the appellate route, the Court of Appeals described this proceeding as a "private controversy between Metromedia and ASCAP over a matter that does not directly concern the United States—the determination of a licensing fee arrangement within the terms of the amended judgment." This is the very reason that petitioner *has*

standing. If the government is not concerned, private rights will be denied for want of a vindicator unless one "affected" and "benefited" by the Amended Judgment is allowed to enforce the rights created for him.

The Court of Appeals relied on two completely inapposite decisions to deny standing. *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002 (S.D. N.Y. 1948) was concerned with a decree where the retention of jurisdiction was expressly limited to applications by the original parties "and no others." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940) held that the legislative history of the National Labor Relations Act clearly showed an intent to grant "exclusive power" to the National Labor Relations Board to redress unfair labor practices and to limit enforcement procedures to those undertaken by the Board. The Court of Appeals likened the status of an ASCAP licensee to that of a beneficiary of a National Labor Relations Board order.

If the Court of Appeals had elected to analogize the status of petitioner to that of a shareholder under the Securities Exchange Act of 1934, it would have been compelled to the conclusion that petitioner had standing. In *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), this Court found that the legislative history of the Securities Exchange Act indicated Congressional intent to confer enforcement power upon private parties.

The issue here is neither employees nor shareholders. This case is concerned with the antitrust laws and the "clearly expressed desire [of Congress]

that private parties be permitted the benefits of prior government actions." *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co., supra.*

II

The Court of Appeals construed the Amended Judgment so as to authorize a continuing violation of the antitrust laws. ASCAP is a copyright pool, a combination of sellers of music, who, but for ASCAP, would be competing with each other for the privilege of licensing the performance of music by radio stations. A concerted refusal to deal by these competing sellers except on terms dictated by them is the very type of antitrust violation that necessitated the complaint and consent decrees in this action. Forcing a standard contract on all users of music is in itself a concerted refusal to deal interdicted by the antitrust laws. See, *United States* v. *Griffith,* 334 U.S. 100, 106 (1948) where this Court found that "a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act."

Such a construction of the Amended Judgment—countenancing continued antitrust violations through insistence on defendant's method of contracting—is the very practice proscribed by this Court in its recent decision in *Columbia Artists Management, Inc.* v. *United States,* 33 U.S.L. Week 3374 (May 24, 1965), affirming 1963 CCH Trade Cases, Par. 70,955 (S.D. N.Y.), on rehearing 1964 CCH Trade Cases, Par. 71,081 (S.D.N.Y.).

There, Columbia Artists, a defendant subject to an antitrust decree, asked the District Court "to construe the decree so as to condone Columbia's continued refusal to deal with" a user of its services "and to approve Columbia's form of contract." The District Court held that insofar as the decree operated to allow Columbia to engage in an anti-competitive practice,

> "the decree is illegal and void as contrary to the letter and policy of the Sherman Act." 1963 CCH Trade Cases, at p. 78,800.

On reargument, the District Court adhered to its opinion that the form of contract for which Columbia sought condonation by reason of the decree was itself

> "a *per se* violation of the Sherman Act which this court cannot and will not sanction even to the extent of finding it in conformity with the consent decree." 1964 CCH Trade Cases, at p. 79,267.

This Court summarily affirmed the judgment of the District Court.

The Court of Appeals construed the Amended Judgment so as to authorize ASCAP to continue doing the very acts alleged in the complaint to be violations of the Sherman Act; i.e., insisting on its own form of license to radio stations (*supra,* footnotes 1 and 2).

Similar problems inhere in the numerous antitrust decrees involving compulsory licensing of patents.[7] It is important for this Court to decide that a person

[7] See Appendix C. Most of the compulsory licensing decrees in patent cases contain the standard provision requiring defendant to advise the applicant of the "royalty it deems reasonable for the patent or patents to which the application pertains."

entitled to a license from a monopolist under the compulsory licensing provisions of an antitrust decree can obtain a form of license suited to his needs and reject a license that discriminates against him. A cartel should not be privileged by an antitrust decree to engage in illegal practices.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 115—September Term, 1964.

(Argued November 30, 1964 Decided March 8, 1965.)

Docket No. 28909

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellee.

METROMEDIA, INC.,

Petitioner-Appellant.

Before:

FRIENDLY and SMITH, *Circuit Judges,*
and BLUMENFELD, *District Judge.**

Appeal from denial of motion by radio broadcaster to punish ASCAP, defendant in government civil antitrust case, for contempt under consent decrees in

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* Sitting by designation.

the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge.* Affirmed.

SMITH, *Circuit Judge:*

Metromedia, Inc., owner and operator of a chain of radio and television stations, moved in the United States District Court for the Southern District of New York to punish the American Society of Composers, Authors and Publishers (ASCAP) for an alleged violation of the consent decree entered in *United States* v. *American Society of Composers, Authors and Publishers,* S. D. N. Y. Civ. No. 13-95, a government antitrust suit to which Metromedia was not a party. The District Court, Sylvester J. Ryan, *Chief Judge,* held that Metromedia did not have "the status or standing to move for punishment for contempt" and denied the motion. Metromedia now appeals. We hold that the appeal is properly before us; that Metromedia has no standing to bring the contempt action, and that even if standing existed, Metromedia's claims do not establish any violation of the terms of the decree, and we affirm the order denying the motion.

ASCAP is an association of composers, authors and publishers of musical compositions organized in 1914 for the purpose of assisting its members in policing and protecting their works against copyright infringements. In exchange for non-exclusive rights to its members' works, ASCAP licenses them for public performance, collects and distributes the royalties, and maintains a continuous surveillance over the myriad of music users for possible infringements. ASCAP has risen to a position of vital importance

with respect to the thousands of such copyright proprietors who would otherwise be unable to check performances of their compositions; to those in the music industry it has come to represent a vast business enterprise controlling the licensing and distribution of a very large majority of the nation's copyrighted musical wares. See *Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322, 332 (S.D.N.Y. 1959).

In 1941 the government recognized the need for federal regulation of ASCAP's widespread activities and instituted antitrust proceedings. ASCAP entered into a consent decree whereby ASCAP, among other things, was required to offer licenses under which the mode of payment was related to the amount of music used. The 1941 decree eventually proved to be not wholly effective and in 1950 was supplanted by an amended judgment; the latter enjoined ASCAP from entering into licensing agreements which discriminate between users similarly situated and provided that the type of license granted either accord the user the right to perform all ASCAP compositions or one or more specified works and that a special procedure be followed for the determination of licensing fees, allowing for judicial intervention at the end of sixty days if ASCAP and the prospective licensee are unable to agree upon a reasonable charge.[1] Additional modifications of the decree were made in 1960.

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[1] The procedure for computing fees, as set out in the 1950 amended decree, is as follows:

"IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the appli-

Opinion of Court of Appeals

The present controversy arises out of Metromedia's application for a blanket license covering its ten radio stations, submitted to ASCAP in December 1963, and drafted in purported compliance with the terms of the 1950 supplemental judgment. Metromedia requested a license which would incorporate a markedly different method for computing royalties than was provided in previous ASCAP blanket licenses with local radio stations. Under the prior blanket agreements, the local station paid a sustaining fee based chiefly on a card rate and, as a commercial fee, 2.125% of its "net receipts from sponsors after deduction" of a sales commission, whereas, under Metromedia's scheme, royalties would be based on a percentage of gross

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cant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

"(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. * * *

"(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement."

receipts, and in the event that gross receipts in any license year exceeded gross receipts for the base year (1962), the percentage royalties payable on the excess would be less.[2] ASCAP refused to quote any fee on the requested basis and took the position that there was nothing in the amended judgment which required it to issue licenses in such a form. Thereafter, in March 1964, Metromedia, without making any further attempt to negotiate with ASCAP or to institute a rate proceeding under Section IX of the amended final judgment,[3] approached the government and demanded that it institute contempt proceedings against ASCAP based on ASCAP's refusal to quote, which

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[2] The fee arrangement which Metromedia contemplated in its license application was quite different from the usual ASCAP blanket license with local radio stations. "Net receipts" is defined in the standard ASCAP agreement to mean the gross amount paid for the use of the licensee's radio broadcasting facilities (for local radio programs), less any advertising commisssion not to exceed 15% actually allowed to a recognized advertising agency. "Gross amount" includes all amounts received for local radio programs after deducting rate card discounts, agency commissions, net revenue cleared at the source, net revenue for political broadcasts, and bad debts. Under the scheme proposed by Metromedia, "gross receipts" would be computed by taking the total revenues received from the sale of broadcasting facilities for local programs together with incidental broadcast revenues and commissions less rate card discounts and bad debts. Since the percentage royalty would depend on the gross receipts for the particular year, the amount collected by ASCAP could vary substantially from the amount collectible under the standard ASCAP formula. It is not clear whether news gathering costs would be a deduction from incidental broadcast revenues or would be nondeductible under sale of station time. Metromedia's formula would exclude trade sales (barter advertising) from gross, contrary to ASCAP's present formula. The total net effect of the changes does not appear in the record.

[3] Metromedia's proper recourse at that time was to continue negotiations with ASCAP for the next few weeks until sixty days had elapsed from the date of its application—or, at least, to make a good faith attempt to negotiate during that period. Failing that, Metromedia then would be able to invoke the court's jurisdiction for the purpose of determining a reasonable fee.

Metromedia claimed was in contravention of the provisions of the amended decree. The government replied that it did not propose to make any decision on the request until this court had rendered its opinion in *United States* v. *ASCAP, Application of Shenandoah Valley Broadcasting, Inc.* Metromedia then moved in the District Court to hold ASCAP in contempt of court "for its neglect and refusal to comply with and obey the Amended Final Judgment . . . , or in the alternative to direct the [government] herein to so move this court." The motion, opposed by both ASCAP and the government, was denied.

The denial of Metromedia's contempt motion is properly reviewable by this court; Section 2 of the Expediting Act, 15 U. S. C. §29,[4] under the circumstances presented here, does not require that appeal be made directly to the Supreme Court from the District Court order. The appellate procedure to be followed in this case appears to us to be governed by the Court's decision in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* 375 U. S. 39, amended 375 U. S. 994 (1963), on remand 331 F. 2d 117 (2 Cir.), cert. den. 377 U. S. 997 (1964), rather than *Terminal R.R. Assoc.* v. *United States,* 266 U. S. 17 (1924).[5] While circum-

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[4] Section 2 of the Expediting Act reads:

"In every civil action brought in any district court of the United States under any of said Acts [antitrust acts], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

[5] The Court held in *Terminal R.R.* that an appeal from an order of the District Court holding defendants in contempt of a prior antitrust decree was governed by Section 2 of the Expediting Act. See also, *United States* v. *California Co-op. Canneries,* 279 U. S. 553 (1929); *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196 (1945); *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212 (1945).

stances are similar in *Terminal R.R.* in that the petitioner there was attempting to enforce the provisions of an antitrust decree by instituting a contempt action (in which the government did not originally join) against one of the defendants, one crucial difference is that the petitioner, a co-defendant, was a party to the decree. Its status to initiate the contempt proceedings was not challenged as is Metromedia's here. Involved in the *Shenandoah* case was the same ASCAP consent decree which is the subject of our present inquiry. Shenandoah Valley Broadcasting, however, unlike Metromedia, was not seeking to hold ASCAP in contempt but instead was attempting judicially to force ASCAP into issuing the type of license that Shenandoah requested. The District Court found that the consent decree did not require ASCAP to issue a special license of that kind, and Shenandoah appealed directly to the Supreme Court under Section 2 of the Expediting Act. In explaining the dismissal of the appeal for want of jurisdiction, the Court held that the Expediting Act did not permit direct appeals from ancillary orders of this type and that such appeals are authorized only from final judgments where the United States is a complainant. "The controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned." 375 U. S. at 40. Similarly, Metromedia's motion for contempt evolves from a private controversy between Metromedia and ASCAP over a matter that does not directly concern the United States—the determination of a licensing fee arrangement within the terms of the amended judgment. Cf. *Olympic Refining Co.* v. *Carter*, 332 F. 2d 260, 263 (9 Cir. 1964).

Finding as we do that this appeal is properly before us, we hold that Metromedia lacks standing to move in this government antitrust action to punish the defendant ASCAP for contempt. Metromedia is not a party to the action and, indeed, could not have intervened as of right. See *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683 (1961).[6]

Metromedia relies on Rule 71 of the Federal Rules of Civil Procedure.[7] Rule 71, however, expressly requires that the order sought to be enforced by the non-party be made in favor of that person. Here, no order was made in Metromedia's favor. No monetary or other relief was specifically granted to Metromedia —it was not even named in the judgment—and it is not enough to say that Metromedia was indirectly or economically benefited by the decree. See *United States* v. *Paramount Pictures, Inc.,* 75 F. Supp. 1002 (S. D. N. Y. 1948). The judgment is in favor of the United States alone.

The status of persons such as ASCAP licensees is not unlike that of the beneficiaries of a National

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[6] ASCAP licensees and users have tried in several ways to alter or enforce the terms of the amended consent decree. In *Sam Fox Publishing Co.,* the petitioner sought to intervene directly in order to acquaint the court with its proposals for the modification of certain provisions in the decree (the government had previously rejected these modifications in the form proposed). Shenandoah Valley Broadcasting instituted rate proceedings under Section IX (A) of the 1950 amended judgment in the hope of convincing the court that ASCAP was compelled under the decree to enter into licensing arrangements which differed from the standard ASCAP licenses and which were drafted to meet the licensee's individual requirements. And now Metromedia has attempted to utilize contempt proceedings.

[7] Rule 71 reads in pertinent part:

"When an order is made in favor of a person who is not a party to the action he may enforce obedience to the order by the same process as if he were a party; * * *"

Labor Relations Board order. A labor organization, even the one which filed the charges upon which the Board's proceedings were initiated, has no standing to have an employer adjudged in contempt for failure to obey a decree enforcing the order of the Board. *Amalgamated Utility Workers* v. *Consolidated Edison Co. of New York,* 309 U. S. 261 (1940). The Board, the Court found, has been provided by Congress with exclusive authority to institute proceedings for the violation of the court's decree directing enforcement. Likewise, the government is the sole proper party to seek enforcement of government antitrust decrees. The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. Thus, the fact that the court retains jurisdiction in an antitrust action does not mean, unless the decree should expressly provide otherwise, that persons affected by the judgment, but not parties to it, can invoke the court's jurisdiction to alter or enforce the terms of the decree.

Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights. The government has not been blind to the needs of the individual members of the music industry; as already noted, the original judg-

ment against ASCAP has been modified from time to time to meet changing conditions. Furthermore, in a situation of this kind where an ASCAP licensee such as Metromedia is disputing ASCAP's computation of fees, resort can be had to Section IX(A) of the 1950 amended decree which authorizes the licensee to apply to the court for the determination of a reasonable fee where the parties are unable to reach agreement within a specified period of time. ASCAP would then have the burden of showing that its existing fee is reasonable and non-discriminatory.

Even if we were to find that Metromedia did have standing to maintain this contempt action against ASCAP, we would nevertheless reach the same result. It is true that a user has the right under the amended decree to a blanket license at a reasonable fee, and that, unlike the applicants in *Shenandoah,* Metromedia is not seeking a license whose scope or coverage differs from that contemplated by the decree but rather is asserting a claim to a reasonable fee. However, Metromedia has no right conclusively to determine certain elements of the "fee" and then to require ASCAP, under pain of contempt, to quote a matching percentage figure. On the contrary, the decree gives ASCAP the initiative in proposing the entire formula, contemplates further negotiations if this appears unreasonable, and directs an application to the court in case of a stalemate. Thus far, it is Metromedia—not ASCAP—which has failed to follow the route marked out by the decree.

The order denying the motion to punish ASCAP for contempt is affirmed.

APPENDIX B

STATUTES

Rule 71 of the Federal Rules of Civil Procedure provides:

> "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party. 28 U. S. C. Rule 71."

Section 1 of Title 15 of the United States Code (§ 1 of the Sherman Act) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

APPENDIX C

Citations to Cases Involving Compulsory Licensing Decrees

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United States v. *Radio Corporation of America*, 1958 CCH Trade Cases ¶69,164 (S.D.N.Y. 1958);

United States v. *United Fruit Co.*, 1958 CCH Trade Cases ¶68,941 (E.D. La. 1958);

United States v. *Robertshaw-Fulton Controls Co.*, 1957 CCH Trade Cases ¶68,592 (W.D. Pa. 1957);

United States v. *National Screen Service Corp.*, 1957 CCH Trade Cases ¶68,670 (S.D.N.Y. 1957);

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United States v. *Bearing Distributors Co.*, 1953 CCH Trade Cases ¶67,595 (W.D. Mo. 1953);
United States v. *Telescope Carts, Inc.*, 1953 CCH Trade Cases ¶67,573 (W.D. Mo. 1953);
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United States v. *Automatic Sprinkler Co. of America*, 1948 CCH Trade Cases ¶62,230 (N.D. Ill. 1948);
United States v. *White Cap Co.*, 1948 CCH Trade Cases ¶62,268 (N.D. Ill. 1948).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 211

METROMEDIA, INC., *Petitioner,*

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Respondent,*

—and—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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July 1, 1965

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent American Society of Composers, Authors and Publishers ("ASCAP") submits this brief in opposition to the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below

The United States District Court for the Southern District of New York did not render a reported opinion. The Court's opinion delivered orally at the time of argument of petitioner's motion is part of the record filed in this Court (R., Vol. II, pp. 13a-14a).*

*Page references with the prefix "R" are to the Appendices of the parties filed with the Court of Appeals and transmitted to this Court by petitioner pursuant to Rule 21(3) of this Court's Rules.

The judgment of the District Court, dated and filed March 25, 1964, provides as follows:

> "Motion denied. See record and transcript of proceedings; so ordered."

The opinion of the Court of Appeals for the Second Circuit is reported in 341 F. 2d 1003 (1965).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1).

Petitioner, relying on § 2, Expediting Act, 15 U. S. C. § 29, has also filed a notice of appeal to this Court from the order and judgment of the District Court. Concurrently with its petition for a writ of certiorari, petitioner has filed a jurisdictional statement in this Court.

Respondent's motion to dismiss petitioner's appeal or, in the alternative, to affirm the judgment of the District Court, is being filed in this Court concurrently with the filing of respondent's brief in opposition to the granting of the petition for a writ of certiorari.

Questions Presented

The narrow questions presented by the petition are:

a) whether petitioner, although not a party to this action, and having refused to resort to the procedures expressly made available to it under the Amended Final Judgment in this action, has standing to move to have respondent punished for contempt; if, and only if this question is answered affirmatively, then the further question arises:

b) whether respondent failed to comply with the directives of Section IX of the Amended Final Judgment when it failed to quote a license fee to petitioner for the peculiar type of license devised by the ingenuity or whim of petitioner.

Statement

ASCAP

ASCAP is an unincorporated membership association organized under the laws of the State of New York with over 9,000 composer, author and publisher members, each of whom grant to ASCAP the non-exclusive right to license non-dramatic public performances for profit of the compositions written, composed or published by such members during the term of their membership in ASCAP.

ASCAP licenses many thousands of users of music throughout the United States, ranging from three national television networks to hotels and restaurants employing music.

ASCAP performs a virtually indispensable service both for its members and for the users of the members' music. By dealing with ASCAP, the user may avoid the necessity (which would frequently be the impossibility) of dealing with a separate copyright proprietor for each composition performed. And by belonging to ASCAP, the individual members are spared what would be the impossible task of attempting to discover and prosecute infringments of their music by radio stations, television stations, restaurants, taverns and myriad other users all over the United States and to negotiate appropriate license agreements with such users.

The opinion of the Court of Appeals in this case noted that (341 F. 2d at 1005)

> "In exchange for non-exclusive rights to its members' works, ASCAP licenses them for public performance, collects and distributes the royalties, and maintains a continuous surveillance over the myriad of music users for possible infringements. ASCAP has risen to a position of vital importance to the thousands of such copyright proprietors who would otherwise be unable to check performances of their compositions. . . ."

ASCAP's Licensing Activity under the Amended Final Judgment

The most important fact about ASCAP's licensing activity is that it is regulated and controlled in virtually every detail by the Amended Final Judgment entered in this antitrust action on March 14, 1950 on the consent of the parties (*United States* v. *American Society of Composers, Authors and Publishers,* S.D.N.Y., Civ. No. 13-95).

The central theme of the Amended Final Judgment is that it guarantees any user the right to perform ASCAP music and guarantees further that he will pay no more than a fair license fee.

Under Section IX of the Amended Final Judgment

> "(A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested." (R., Vol. I, p. 11a).

If the parties are unable to agree upon a reasonable fee within sixty days from the date when the application is received

> "the applicant therefor may forthwith apply to [the United States District Court for the Southern District of New York] for the determination of a reasonable fee." (R., Vol. I., p. 11a).

In any such proceeding, the burden is on ASCAP to establish the reasonableness of the fee which it has requested (R., Vol. I, p. 11a).

Once a reasonable fee has been finally determined by the Court, ASCAP is required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP (Section IX [C], R., Vol. I, pp. 12a-13a). And even without a Court order fixing a fair rate, ASCAP is forbidden at all times to discriminate "in license fees or other terms and conditions between licensees similarly situated" (Section IV [C], R., Vol. I, pp. 4a-5a).

ASCAP has the right to urge the Court to fix the fee requested by it, but it has the burden of establishing the reasonableness of the fee it seeks.

The task of listening to the contentions of the parties and of arriving at a determination of a reasonable fee is committed by the Amended Final Judgment to the District Court.

ASCAP Licenses with Broadcasters

For many years, ASCAP licenses with broadcasters have had the license fee expressed as a percentage of a rate base, as defined by the license agreement. Both aspects of the fee—the percentage and the rate base—have undergone change in recent years as the result of negotiations between

ASCAP and the broadcasters in the course of Section IX proceedings commenced by the broadcasters, and concluded with the aid of the District Court.

The changes in the rate structure of the blanket license agreements between ASCAP and local radio stations were not, as can readily be appreciated, changes dictated by ASCAP. They were changes which resulted from long and vigorous negotiations between the parties concerned, aided by the Court in which rate proceedings have been pending.*

ASCAP is not presently dictating to radio broadcasters the terms of new licenses. In the District Court, there are now pending seven separate proceedings commenced by radio networks and by more than 1400 local radio stations for the determination of reasonable license fees under the Amended Final Judgment. If the parties to these proceedings fail to agree on the terms of new licenses, the District Court stands ready to make a determination of the reasonable license fees to be paid by the broadcasters.

Petitioner has not commenced any such proceeding, although it has an undisputed right to do so.

The Proceedings Below

Petitioner holds licenses from the Federal Communications Commission for 10 local radio stations.

On December 23, 1963, petitioner purported to exercise its initial rights under Section IX of the Amended Final Judgment by applying to respondent for blanket licenses for petitioner's local stations (R., Vol. I, pp. 63a-65a).

---

*For example, in the blanket license agreements between ASCAP and local radio stations which expired at the end of 1963, the commercial fee was 2⅛% (as compared to 2¼% under the prior agreements) of a rate base which expressly permitted deduction for certain programming and production costs (as compared to a rate base in the prior agreements which did not expressly permit such deductions).

Petitioner's application, however, was more than "an application for the right of public performance of any, some or all" of the compositions in the ASCAP repertory. Instead of the general application contemplated by Section IX, petitioner proposed a license tailored to meet its own peculiar desires:

> (a) With regard to the license fee, petitioner took the initiative from ASCAP and proposed that the fee be calculated in a substantially different manner than in any previous ASCAP blanket license with local radio stations;* and
>
> (b) Petitioner also demanded its own unique form of reporting requirements.**

Having thus drawn up its own license form, petitioner left ASCAP only the right to quote (and demanded that ASCAP quote) the percentage figures to be applied to the new and unique scheme devised by petitioner (R., Vol. I, pp. 63a-65a).

---

*Under the local station blanket radio licenses which expired December 31, 1963, the broadcaster paid, as a commercial fee, 2.125% of its "net receipts from sponsors after deductions," as those words were defined at length (R., Vol. I, pp. 39a-43a). Under petitioner's scheme, the license fee would be paid on the basis of "gross receipts" instead of "net receipts from sponsors after deductions" and, in the event that gross receipts in any license year exceeded gross receipts for a base year (1962), the percentage royalties payable on the excess would be less. However, even under petitioner's proposed "gross receipts" formula, there would be deductions for rate card discounts and bad debts. Thus petitioner demanded its own idiosyncratic rate base.

**For example, as to reports of music played on the licensee's radio station, petitioner would require ASCAP to give two weeks' advance notice of each period for which it wished a report. And reports to ASCAP showing the license fees due were to be keyed to the Annual Financial Report form required of radio stations by the Federal Communications Commission.

Petitioner's application did not request ASCAP to quote "the fee which it deem[ed] reasonable" for its right "of public performance of any, some or all" of the compositions in the ASCAP repertory (Sec. IX [A]) (R., Vol. I, p. 11a). Rather, petitioner asked ASCAP to quote one component part of the license fee—the percentage—while petitioner purported unilaterally to determine the other principal component of the fee, the rate base, and also all other terms and conditions of the license.

ASCAP did not comply with petitioner's demand. But ASCAP did advise petitioner—as it advised all other local stations which applied for licenses—of the fee which it deemed reasonable for a local station blanket license.

Petitioner made no attempt to negotiate with ASCAP. Nor did it institute a rate proceeding under Section IX of the Amended Final Judgment. Instead, it demanded that the Government institute contempt proceedings against ASCAP for an asserted failure to comply with Section IX (R., Vol. I, pp. 84a-88a). Upon the Government's refusal to do so (R., Vol. I, pp. 89a-90a), petitioner commenced the present proceedings in the District Court, seeking to punish ASCAP for contempt on the ground that ASCAP had failed to comply with the requirements of Section IX that it quote a license fee.

Chief Judge Ryan, who has had nine years of experience in administering the Amended Final Judgment, denied petitioner's motion. He held that petitioner lacked standing to move to have ASCAP punished for contempt (R., Vol. II, p. 13a). He also denied the motion on the merits, saying:

> "I also feel that you have no right to dictate or attempt to dictate arbitrarily the basis upon which your fee should be computed. In other words, as part of your license, I don't think any applicant has

> a right to say that the fee should be computed either on the net or the gross returns or receipts. That is a matter which you could urge on a hearing for fixation of reasonable fees after ASCAP has told you the basis on which they will grant you a license.
>
> "I think the most you can do here is to ask for a blanket license, and then on return of their offer you can ask for a hearing and urge, as you do now, that fixing it on the basis of net receipts is manifestly unjust and discriminatory and violates section 8 of the decree.
>
> "I think your application here to punish for contempt must be denied." (R., Vol. II, p. 14a).

A unanimous Court of Appeals for the Second Circuit affirmed Chief Judge Ryan's decision; the Court held that (341 F. 2d at 1005)

> "the appeal is properly before us, that Metromedia has no standing to bring the contempt action, and that even if standing existed, Metromedia's claims do not establish any violation of the terms of the decree. . . ."

Argument

The decision below is clearly correct. Moreover, it neither involved nor turned on any significant question of federal law that should be decided by this Court. Petitioner has failed to show any special and important reason for granting its petition for a writ of certiorari to review the decision below. Accordingly, the petition should be denied.

I.

Petitioner relies here—as it relied below—on Rule 71, F. R. Civ. Pr., as authority for its standing to move to

have ASCAP punished for contempt. Petitioner suggests that this case raises the question of the proper interpretation of Rule 71.

Rule 71 provides in pertinent part:

> "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party. . . ."

The Court of Appeals held that petitioner was not a person in whose favor the Amended Final Judgment had been made. The Court said (341 F. 2d at 1008):

> "Here, no order was made in Metromedia's favor. No monetary or other relief was specifically granted to Metromedia—it was not even named in the judgment—and it is not enough to say that Metromedia was indirectly or economically benefitted by the decree. See United States v. Paramount Pictures, Inc., 75 F. Supp. 1002 (S. D. N. Y. 1948). The judgment is in favor of the United States alone."

The decision of the Court of Appeals is clearly correct and raises no significant question concerning the proper interpretation of Rule 71. Petitioner has cited no authority —and we know of none—which suggests or even implies that Rule 71 is applicable to the unique situation existing here under the Amended Final Judgment. The Amended Final Judgment is not an ordinary order or judgment of the Court. It is a unique quasi-legislative document which regulates ASCAP's licensing activities in virtually every detail. By virtue of Section IX, countless thousands of would-be users of ASCAP music are granted an absolute

right to a license and the right to have the District Court determine a reasonable license fee.*

Rule 71 was never intended to apply to this kind of situation. Surely, each one of the thousands of would-be users of ASCAP music does not have the right to ignore the procedures expressly made available to private parties and to move to have ASCAP punished for contempt any time he believes himself aggrieved. And surely this must be true when the Government—the plaintiff in this action—finds no basis for instituting contempt proceedings.

The Court of Appeals explicitly recognized the desirability of leaving the choice and power to enforce the Amended Final Judgment in the hands of the Government. The Court said (341 F. 2d at 1008):

> "It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection for their rights. The government has not been blind to the needs of the individual members of the music industry; as already noted, the original judgment against ASCAP has been modified from time to time to meet changing conditions."

Particularly is the result reached by the Court of Appeals sound where the Amended Final Judgment grants a remedy to would-be users of ASCAP music—the right to apply under Section IX to the District Court for deter-

---

*According to *Statistical Abstract of the United States* (1964), there are 29,203 hotels, 2,754 skating rinks and 875 dance halls in the United States (Table #1192, p. 838). According to *Census of Business* (1958), there are 344,740 eating and drinking places in the United States (Table I, pp. 1-5). All are potential users of ASCAP's music as is each and every radio and television station in the United States.

mination of a reasonable license fee. Both Chief Judge Ryan and the Court of Appeals recognized that a denial of petitioner's motion did not leave petitioner remediless.

It is precisely because petitioner has an explicit remedy under Section IX of the Amended Final Judgment that this case does *not* raise the issue of the denial of enforcement rights to private parties who are beneficiaries of civil antitrust decrees entered in Government actions. The only right that has been denied to petitioner by the decision below is the right to use a contempt proceeding to compel ASCAP to capitulate *ab initio* to petitioner's demands for a unique kind of local station blanket license devised to suit the particular whim of this petitioner.

Petitioner's reliance on this Court's decision in *Minnesota Mining and Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 33 U. S. L. Week 4481 (May 24, 1965) is misplaced. The issue there was whether a proceeding instituted before the Federal Trade Commission tolled the running of the statute of limitations under the Clayton Act for private treble-damage antitrust actions. That case had nothing to do with the rights of private persons to utilize contempt proceedings to enforce civil antitrust decrees to which they were not parties.

The holdings of the two courts below were both based on the same, narrowly delineated ground—that in the circumstances of the carefully drawn, very specialized and carefully administered decree here involved, petitioner, a non-party to that decree, had no right to ignore the procedures expressly made available to it and to resort to contempt proceedings. There is, we submit, no reason for further review of these holdings.

II.

Petitioner argues that the decision of the Court of Appeals construed the Amended Final Judgment so as to authorize a continuing violation of the antitrust laws be-

cause, in petitioner's view, it permits ASCAP to force a standard form of license on all users of music.

Petitioner's argument is without merit. The fact is that petitioner seeks in this proceeding to compel ASCAP to capitulate, without the benefit of a Section IX proceeding, to petitioner's proposal for a new rate base in a local station blanket license. Petitioner seeks in this way to bypass the procedures set forth in Section IX of the Amended Final Judgment for the determination of a reasonable license fee.

The essence of petitioner's argument is that, under the Amended Final Judgment, the licensee has the right to compel ASCAP to accept a license form tailored to the licensee's peculiar desires. No matter what form of license the applicant may contrive, says petitioner, ASCAP is required to quote a fee for that form of license. Thus, petitioner can devise its own rate base, every other radio station owner can devise his own rate base and every tavern owner can devise his own rate base. And, says petitioner, ASCAP must quote a different fee for every user and grant every user his own special license. The number of combinations and permutations defies imagination; surely ASCAP could never sustain the burden of establishing the reasonableness of its rates among users similarly situated and resist a charge of discrimination among such users.

Nothing in the Amended Final Judgment—let alone in logic or common sense—requires such a ludicrous result. See *Matter of Shenandoah Valley Broadcasting, Inc.*, 331 F. 2d 117 (2d Cir.), *cert. denied*, 377 U. S. 997 (1964). Under Section IX, ASCAP has the right and the obligation to quote a license fee—ASCAP cannot be restricted to the peculiar method of computation and reporting requested by each of the many applicants for a license. Moreover, if the District Court has the power to adjudicate a reasonable license fee when the parties cannot agree, then surely

petitioner does not have the right to impose on ASCAP and the Court its personal method of computing fees.

The Court of Appeals held that (341 F. 2d at 1009)

> ". . . Metromedia has no right conclusively to determine certain elements of the 'fee' and then to require ASCAP, under pain of contempt, to quote a matching percentage figure. On the contrary, the decree gives ASCAP the initiative in proposing the entire formula, contemplates further negotiations if this appears unreasonable, and directs an application to the court in case of a stalemate. .Thus far, it is Metromedia—not ASCAP—which has failed to follow the route marked out by the decree."

Petitioner's own discussion of *Columbia Artists Management, Inc.* v. *United States,* 33 U. S. L. Week 3374 (May 24, 1965) shows that the case is irrelevant here. There the District Court, addressing itself to the substance of the claimed anti-trust violation, refused to sanction a per se violation of the Sherman Act, merely because the violation allegedly conformed to a consent decree. Here, the District Court has not passed on the substance of petitioner's claim, but has properly ruled that orderly procedure requires that the claim be considered in the context of a Section IX proceeding.

We fail to see how a continuing violation of the anti-trust laws is authorized when petitioner remains free to pursue the procedures of Section IX and to present to the Court all of the arguments presented in support of the unusual proceeding which petitioner has resorted to.

Once ASCAP has supported its burden of establishing the reasonableness of the fee requested by it and a reasonable fee has been determined pursuant to Section IX, ASCAP is required to offer a license at a comparable fee to all other applicants similarly situated. There is no re-

quirement that such other applicants accept the licenses offered, and each applicant remains free to initiate its own proceeding for the determination of a reasonable fee as provided in Section IX.

We submit that the petition here does not bring to this Court any important federal question. All that is involved is petitioner's refusal to resort to the procedures set forth in a carefully worked out and carefully administered decree as it relates to a would-be user of ASCAP's repertory.

Conclusion

This case presents very narrow and particularized issues that are not of general public importance warranting the consideration of this Court. The decision below was correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION IN NO. 211

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM IN NO. 212

OPINIONS BELOW

The oral opinion of the district court (Def. App. 13a-19a)[1] is unreported. The opinion of the court of appeals (Pet. A1-A10) is reported at 341 F. 2d 1003.

JURISDICTION

Uncertain as to the proper appellate procedure, Metromedia, Inc., has filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit (No. 211) and, in the alternative, has docketed a direct appeal from the judgment of the United States District Court for the Southern District of New York (No. 212). The judgment of the court of appeals was entered March 8, 1965. The petition for a writ of certiorari in No. 211 was filed June 4, 1965. The jurisdiction of this Court in No. 211 is invoked under 28 U.S.C. 1254(1). The district court order was entered on March 25, 1964. The notice of appeal to this Court in No. 212 was filed on May 19, 1964. The district court extended the time in which to docket the appeal until [redacted] and the jurisdictional statement was filed on June 4, 1965. The jurisdiction of this Court on direct appeal is invoked under Section 2 of the Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. We submit, *infra*, p. 9, that this provision is inapplicable and that the appeal in No. 212 should be dismissed.

June 28 1965

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[1] "Def. App." refers to the "Brief and Appendix of Defendant-Appellee" in the court of appeals.

QUESTION PRESENTED

Whether a nonparty may initiate a proceeding in a government antitrust suit for contempt of a consent judgment, where the consent judgment explicitly establishes a different district court procedure through which such a nonparty may enforce the judgment against the defendant.

STATEMENT

ASCAP is an organization of composers, authors, and publishers organized for the purpose of licensing the performance of its members' copyrighted works and protecting them against infringements. In 1941, the United States filed a complaint charging ASCAP with having violated Section 1 of the Sherman Act. The suit was settled by a consent decree, subsequently amended in 1950 and in 1960 (Pet. A3). The decree regulates the relations of ASCAP to its members and sets the terms upon which ASCAP is to issue licenses for the public performance of copyrighted works in its repertory. As pertinent here, the decree requires ASCAP to "grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Decree, Section VI, Pet. App. 9a).[2] Upon receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it [ASCAP] deems reasonable for the license requested" (Decree, Section IX(A), Pet. App. 11a). If the parties are

[2] "Pet. App." refers to the "Appendix of Petitioner-Appellant, Metromedia, Inc.," in the court of appeals.

unable to agree upon a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply to this Court [the District Court for the Southern District of New York], for the determination of a reasonable fee * * *" (*ibid.*).[4] Section XVII of the decree specifically confers upon the "parties" to the judgment the right to apply to the district court for "further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof" (Pet. App. 17a).

Metromedia owns and operates ten radio stations which use compositions licensed by ASCAP. From January 1, 1959, to December 31, 1963, these stations operated under a so-called blanket license which authorized Metromedia to use all of the ASCAP repertory and which provided for computation of royalty payments under a standard formula used in such ASCAP licenses to radio stations. This formula was based in part upon the stations' "net receipts from sponsors" after certain deductions and in part upon their advertising rates. On December 23, 1963, Metromedia applied for a blanket license under which royalty payments would be computed pursuant to a different formula based upon gross, rather than net, receipts from sponsors, with a lower percentage to be

[4] In such a proceeding, ASCAP has the burden of establishing that the fee it seeks to charge is reasonable. ASCAP is also required to give the Attorney General notice of the court proceeding (Decree, Section IX(A), Pet. App. 11a).

charged for that portion of gross receipts exceeding the gross receipts for the year 1962.[4] ASCAP declined to quote a royalty fee computed on this basis. Instead of instituting a proceeding "for the determination of a reasonable fee" in the district court under Section IX of the amended decree, Metromedia demanded that the United States commence a civil contempt proceeding against ASCAP (Pet. A5-A6). The United States declined (Pet. A6).[5]

Metromedia then moved the district court to hold ASCAP in contempt for failure to comply with the amended decree, or, in the alternative, to direct the United States to initiate a contempt action. Both motions were denied (Pet. A6). Because of doubt regarding the proper review procedure, Metromedia filed a notice of direct appeal from the district court's decision in this Court and also prosecuted an appeal to the court of appeals. The court of appeals (Pet. A1-A10) held (1) that it had jurisdiction of the appeal, (2) that Metromedia had no standing to bring the contempt action, and (3) that even if Metromedia were to be

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[4] Metromedia contends that its proposed royalty formula will avoid burdensome accounting problems associated with the net-receipts formula and will remedy a discrimination against it which results from the net-receipts method (Def. App. 6a-8a).

[5] The government at first declined to initiate such a proceeding until the Court of Appeals for the Second Circuit had rendered its decision in *United States* v. *ASCAP, Application of Shenandoah Valley Broadcasting, Inc.*, 331 F. 2d 117, certiorari denied, 377 U.S. 997 (Pet. A6). Thereafter, having made a full review of the facts, the government decided that a civil contempt proceeding was not justified.

deemed to have standing, the allegations did not show any violation of the consent decree since "[t]hus far it is Metromedia—not ASCAP—which has failed to follow the route marked out by the decree" (Pet. A10).

ARGUMENT

1. The court of appeals correctly held that Metromedia lacked standing to maintain a contempt proceeding against ASCAP for violation of the decree entered in the government antitrust suit. Petitioner was not a party to the proceedings initiated by the United States which resulted in the consent judgment against ASCAP and had no right to intervene, had it sought to do so. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683. While Metromedia may, of course, bring a civil antitrust suit against ASCAP (*id.* at 689),* it does not have standing to enforce the government decree, except as provided therein. *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002, 1004 (S.D. N.Y.); cf. *Restatement of the Law of Judgments*, §§ 79, 93. By its terms, Section

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*Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co., No. 291, O.T., 1964, decided May 24, 1965, upon which Metromedia relies, deals with one of the procedural benefits enjoyed by private antitrust plaintiffs—tolling of the statute of limitations during the pendency of a government proceeding. Congressional solicitude for antitrust plaintiffs has been expressed by conferring this and other advantages applicable in private suits. Congress has not, however, conferred upon private parties the power directly to enforce decrees obtained by the government.

XVII of the decree permits only the "parties" to apply for enforcement orders. This limitation *a fortiori* applies to the initiation of contempt proceedings.

This result rests upon sound considerations. The Attorney General properly has the broadest discretion in deciding to initiate suits under the antitrust laws and in negotiating and agreeing upon consent decrees (*Swift & Co.* v. *United States*, 276 U.S. 311, 331-332; *United States* v. *Ward Baking Co.*, 376 U.S. 327). As the court of appeals held, this discretion "requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. * * * Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights" (Pet. A9). The risks of multiple and chaotic litigation are especially apparent in this case, where ASCAP has more than 30,000 licensees, all of whom are, like Metromedia, beneficiaries of the consent decree.

Petitioner's position that it has standing derives no independent support from Rule 71 of the Federal Rules of Civil Procedure, which permits a nonparty to enforce an order which has been "made in favor" of that person. The consent judgment was "in favor"

of the United States, not Metromedia.[1] Should Metromedia bring a proceeding under Section IX of the judgment, the district court might then enter orders explicitly "in favor" of it as to which Rule 71 would be applicable.

2. Metromedia, moreover, has a wholly adequate remedy which it has thus far chosen not to pursue. Section IX of the consent decree clearly prescribes the procedure to be followed by license applicants who claim a violation of the decree's provision requiring ASCAP to grant licenses on reasonable terms. If the fee quoted by ASCAP is deemed unreasonable, Metromedia "may forthwith apply to this Court [the district court] for the determination of a reasonable fee." As the district judge explicitly held in this case, it is clear that petitioner's contentions that ASCAP has violated the terms of the consent decree in refusing to quote a fee based upon the formula proposed

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[1] Rule 71 would apply if a judgment expressly named a nonparty as a beneficiary thereof or otherwise expressly conferred upon a nonparty the right of enforcement (see *United States* v. *Hackett*, 123 F. Supp. 104 (W.D. Mo.); *Woods* v. *O'Brien*, 78 F. Supp. 221 (D. Mass.); cf. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502). In addition, in one government antitrust case, the district court held that a nonparty had the right to seek enforcement, although not specifically conferred by the judgment, since no procedure under the judgment was established to permit him to vindicate his rights. *United States* v. *Vehicular Parking*, 7 F.R.D. 336 (D.C. Del.); see also *In re Paleais*, 296 Fed. 403 (C.A. 2); *Secor* v. *Singleton*, 35 Fed. 376 (C.C.E.D. Mo.). This doctrine does not apply here, since the present consent judgment provides a remedy whereby Metromedia may challenge the reasonableness of ASCAP's offered formula or fee.

by petitioner, rather than on ASCAP's standard formula, is fully litigable in a proceeding under Section IX.[8] Petitioner offers no explanation as to why it has failed to pursue this available remedy.

3. The appeal in No. 212 should be dismissed for lack of jurisdiction in this Court. Under Section 2 of the Expediting Act, 15 U.S.C. 29, a direct appeal lies to this Court from final judgments in civil antitrust actions brought by the United States, but not when the controversy "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned." *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39, 40. *Shenandoah* concerned the same ASCAP decree here at issue, the controversy being whether ASCAP was required to issue a type of license sought by the appellants in that case. Should the Court, however, deem the district court's judgment to be within the Expediting Act, we submit, for the reasons given above, that the judgment was clearly correct and should be affirmed.

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[8] In denying Metromedia's motions, the district judge said:

> I think the most that you can do here is to ask for a blanket license, and then on return of their offer you can ask for a hearing and urge, as you do now, that fixing it on the basis of net receipts is manifestly unjust and discriminatory and violates section 8 of the decree.

The judge went on to encourage Metromedia to bring such a proceeding, to state that he would seriously consider its contentions, and to encourage ASCAP to negotiate seriously with Metromedia over its suggested changes in the license (Def. App. 14a-17a).

CONCLUSION

The petition for a writ of certiorari in No. 211 should be denied, and the appeal in No. 212 should be dismissed or, in the alternative, the judgment in that case should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 211 and 212

METROMEDIA, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

METROMEDIA, INC.,

Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITIONER'S REPLY BRIEF IN NO. 211

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM IN NO. 212

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September 14, 1965

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The Real Issue

The issue really posed by this case is whether an adjudicated monopolist, operating under the compulsory licensing provisions of an antitrust decree, may perpetuate the anticompetitive practice of forcing a single form of license of its own devising upon all radio stations.

The licensing fee arrangement sought by Metromedia is concededly "within the terms of the amended judgment" (Opinion below, Pet. A-7); no one challenges the reasonableness of the form of license sought by Metromedia. The sole basis for ASCAP's refusal to quote a fee for the kind of license sought by Metromedia is ASCAP's unwillingness to issue "different forms of license" (R. Vol. I, p. 31a) and its claim that the decree requires that an ASCAP license "has got to be uniform for all local stations" (R. Vol. II, p. 17a). Despite the absence of any factual issues, ASCAP having conceded that this case only involves "a matter of law" (R. Vol. II, p. 3a), the question of Metromedia's entitlement to a reasonable license within the terms of the decree remains unanswered.

Respondents have not met the substantial issue, claiming it is raised by the wrong party in the wrong proceeding. ASCAP's position here is belied by its own contradictory arguments elsewhere. The government's position here is undermined by its own concessions.

ASCAP's Bad Faith

The bad faith of ASCAP is revealed by a comparison of its argument to this Court and its argument to the District Court in another proceeding now pending under the same Amended Judgment. In its brief to this Court (pp. 11-12) ASCAP argues that Metromedia—in its endeavor to secure a form of license suited to its needs—has a complete remedy under Section IX of the Amended Final Judgment:

> "Particularly is the result reached by the Court of Appeals sound where the Amended Final Judgment grants a remedy to would-be users of ASCAP music—the right to apply under Section IX to the District Court for determination of a reasonable license fee. Both Chief Judge Ryan and the Court of Appeals recognized that a denial of petitioner's motion did not leave petitioner remediless.
>
> "It is precisely because petitioner has an explicit remedy under Section IX of the Amended Final Judgment that this case does *not* raise the issue of the denial of enforcement rights to private parties who are beneficiaries of civil antitrust decrees entered in Government actions."

In a Section IX rate proceeding now pending in the District Court for a television license, ASCAP argues that the form of license is not litigable. ASCAP's Memorandum in Response to Petitioner's "Tentative Statement of Issues," February 10, 1965, in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, Civil Action No. 13-95, states:

"The only issue for the Court to decide in this proceeding, as Section IX of the Amended Final Judgment makes crystal clear, is what is 'a reasonable fee' for the blanket and per program licenses which television stations have sought and obtained from the Society for over 15 years.

"The pleadings raise no other issue. Indeed, no other issue could be raised in a proceeding brought under Section IX of the Amended Final Judgment. (p. 2)

* * * *

"Moreover, under Section IX of the Amended Final Judgment, the Court is required only to make a determination as to 'a reasonable fee'. The Court is not required to rewrite the many provisions of the ASCAP blanket and per program licenses that relate to matters other than the reasonableness of the fee." (p. 7)

Thus, in this Court ASCAP argues that review should be denied because the licensee has an adequate remedy in the District Court under Section IX to obtain an authorized but different form of license. In the District Court, ASCAP argues that a licensee has no such remedy.

ASCAP also attributes to Metromedia an argument it has never made, viz., that ASCAP must "grant every user his own special license" (ASCAP Br., p. 13). Metromedia's argument is simply that absent any issue over the reasonableness and propriety of the blanket license sought by it, ASCAP must quote a fee thereon. ASCAP's reluctance to grant Metromedia a different form of license stems from ASCAP's unwillingness to permit radio stations to have a choice

of licenses. (R. Vol. I, p. 31a). However, as this Court said in *United States* v. *Paramount Pictures*, 334 U.S. 131, 159 (1948):

> "But the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest, in a practice which contravenes the policy of the antitrust laws, receive judicial sanction."

This is a Section IX Proceeding

Both ASCAP and the United States argue that Section IX of the Amended Judgment affords Metromedia an adequate remedy which it has not pursued. The fact is that Metromedia *is* proceeding under Section IX.

As the record demonstrates, Metromedia's request to ASCAP stated: "The within application is made pursuant to Section IX of the amended final judgment . . ." (R. Vol. I, p. 65a). The government concedes that Section IX of the Amended Judgment requires ASCAP to advise the applicant of the fee which ASCAP deems reasonable "for the license requested" (U.S. Br., p. 3). The government then notes that if the parties are unable to negotiate a mutually agreeable fee within 60 days thereafter, the applicant may petition the District Court for the determination of a reasonable fee in which proceeding ASCAP has the burden of establishing the reasonableness of the fee it seeks to charge (U.S. Br., p. 4).

The government also concedes that Metromedia is one of the "beneficiaries of the consent decree" (U.S.

Br., p. 7), and that the controversy as to whether ASCAP must issue the type of license sought "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned" (U.S. Br., p. 9).

Finally, in its statement of the Question Presented, the government concedes that Metromedia may enforce the judgment against the defendant, but in "a different district court procedure" (U.S. Br., p. 3).

When ASCAP refused to quote, as required by Section IX, claiming that it did not have to issue "different forms of license," Metromedia made this motion, expressly pursuant to Section IX, to procure a determination of ASCAP's duty to comply with Section IX and quote a fee (R. Vol. I, pp. 21a-22a, 24a-25a).

The motion was not an attempt to usurp the government's prerogative of initiating contempt proceedings for enforcement of the decree. Rather, it was simply a procedure to secure the right specifically conferred upon an applicant to the quotation of a fee on a form of license authorized by the decree. The distinction is vital. Metromedia concedes that it could not maintain contempt proceedings for a violation by ASCAP of one of the general injunctions of the Amended Judgment. Thus, if ASCAP flouted a provision of Section IV(A)-(H), Metromedia would have to accept the government's action or inaction. However, when Metromedia initiates a Section IX proceeding, which is "entirely between private parties," Metromedia may compel ASCAP to follow the route marked out by Section IX.

Apparently, the government and ASCAP contend that a Section IX proceeding is not initiated until a petition has been filed in the District Court for the determination of a reasonable fee. Such a reading of the decree ignores the expressly required prior steps of quotation and negotiation, as well as the provision casting upon ASCAP the burden of establishing the reasonableness of a fee theretofore quoted by it.

Conclusion

Again we emphasize that the only real issue is whether ASCAP may dictate the terms of its licenses. If ASCAP can dictate the terms of its licenses with complete disregard for the needs of the licensee, then the Amended Judgment does not curb the ASCAP monopoly; it furthers it.

Respectfully submitted,

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